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SREESANTHAN ELIATHAMBY v. PP

HIGH COURT MALAYA, KUALA LUMPUR
ROZANA ALI YUSOFF JC
[CRIMINAL TRIAL NO: WA-44-143-09-2018]
1 MARCH 2019

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CRIMINAL PROCEDURE: *Revision – Application for – Revision of decision of Sessions Court to join trials and hear two charges together – Whether charges ought to be heard separately – Whether joining trials and hearing charges together would cause confusion to trial judge – Whether there were risks of prejudice and denial of fair trial to accused and illegal trial – Criminal Procedure Code, ss. 164, 165 & 166*

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CRIMINAL PROCEDURE: *Trial – Joint trial – Accused persons charged for two counts under s. 188(2)(a) of Capital Markets and Services Act 2007 – Prosecution applied for charges to be heard together – Whether charges ought to be heard separately – Whether joining trials and hearing charges together would cause confusion to trial judge – Whether there were risks of prejudice and denial of fair trial to accused and illegal trial – Power of court to order separate or joint trials – Criminal Procedure Code, ss. 164, 165 & 166*

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The applicant was charged at the Sessions Court for two counts under s. 188(2)(a) of the Capital Markets and Services Act 2007. The respondent ('the prosecution') filed an application for both charges to be heard together and the application was allowed. Hence, the present application for criminal revision by the applicant. The applicant submitted that the Sessions Court Judge ('SCJ') should have ordered the charges against him be tried separately as (i) the charges were not related to each other; (ii) the parties might call their own expert witnesses to produce technical documents and these expert witnesses would likely give evidence in respect of shares of two different and unrelated companies and for different transactions; (iii) if the charges are tried together, there would be the introduction of evidence to show the applicant is guilty of some other offence; (iv) it would prevent unfairness or embarrassment by inadvertently leading to confusion of issues that would subsequently prejudice the applicant and deny his right to a fair trial; and (v) a misjoinder of charges would result in an illegal trial. Resisting the applicant's application, the prosecution argued that (i) there was only one accused and that was the applicant; (ii) both charges came from the same offence; (iii) both offences were said to be committed within the period of 12 months; (iv) the applicant's grounds to object the joint trial were not applicable and unfounded as the grounds were only applicable if the application was made under ss. 165 and 166 of the Criminal Procedure Code; (v) the prosecution had fulfilled the elements set out under s. 164 of the CPC; (vi) the applicant did not specifically state how the said confusion would subsequently prejudice the applicant and deny his right to a fair trial;

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(vii) the joint trial would not result in an illegal trial because what the SCJ did was only to decide for the matter to be heard together, not by joining the charges into one charge. The SCJ would still have to come up with the findings for both charges even if they were heard together; and (viii) the joint trial would save the parties' time and costs.

Held (dismissing application; affirming order of Sessions Court):

(1) Section 163 of the CPC provides that, for every distinct offence of which any person is accused, there shall be a separate charge and every such charge shall be tried separately except in the cases mentioned in ss. 164, 165, 166 and 170. Based on the reading of ss. 163 and 164 of the CPC, while there should be a separate trial for every distinct offence which a person is charged with, it is not a must. The power to order separate or joint trials is a power exercisable by the court. The granting or refusing of the application for separate trials is a matter of discretion for the trial judge and where such discretion had been judicially exercised by the SCJ, the court would not interfere unless it appeared that miscarriage of justice had resulted from either the granting or the refusal of the application. (paras 15 & 19)

(2) There would be no confusion of issues since the offences were not distinct. The two offences were of the same kind, in respect of acquisition of shares, and were committed by the same person within seven months apart, which was not more than 12 months. These two offences are punishable with the same amount of punishment under the same section of the same Act. In addition, the parties were well-prepared for the trial because during the case management, they would submit the agreed issues to be tried together with the list of witnesses and bundle of documents, including any relevant technical documents to be produced by the expert witnesses. By the introduction of these documents, including the agreed facts, there would be no confusion of issues that would prejudice the applicant and deny his right to a fair trial. The issues of prejudice or miscarriage of justice did not arise. Since the two charges could be tried in a single trial, neither unfairness nor embarrassment would be an issue. (paras 17 & 19)

Case(s) referred to:
Herchun Singh & Ors v. PP [1969] 1 LNS 52 FC ***(refd)***
Jayaraman & Ors v. PP [1979] 1 LNS 36 HC ***(dist)***
Mohamed Ramly Hj Rasip v. PP [1940] 1 LNS 56 HC ***(refd)***
Peter Tham Wing Fai v. PP [1988] 1 LNS 35 HC ***(refd)***
PP v. Hamzah Yunus [2017] 1 LNS 1185 CA ***(refd)***
Rex v. Sakandar Khan [1939] 1 LNS 99 HC ***(refd)***

Legislation referred to:
Capital Markets and Services Act 2007, s. 188(2)(a), (4)
Courts of Judicature Act 1964, ss. 31, 35
Criminal Procedure Code, ss. 163, 164, 165, 166, 170, 323, 325

A *For the applicant - Tan Hock Chuan & Cains Tan; M/s Steven Thiru & Sudhar Partnership*
For the respondent - Aimi Khalidah; DPP

Reported by Najib Tamby

B **JUDGMENT**

Rozana Ali Yusoff JC:

Introduction

C **[1]** This is a criminal revision application brought by Sreesanthan a/l Eliathamby (the applicant) on 4 September 2018 through a notice of motion (encl. 1) under s. 164 of the Criminal Procedure Code, ss. 31 and 35 of Courts of Judicature Act 1964 and/or ss. 323 and 325 of the Criminal Procedure Code and the discretionary powers of the High Court to revise an order made by the learned Sessions Court Judge (SCJ) dated 23 August 2018 D which allowed the respondent's application for the Criminal Charges No. 62-575-07-2012 and No. 62-576-07-2012 to be heard together. This application for revision also includes an application for stay of proceedings at Sessions Court pending the disposal of this notice of motion.

[2] The affidavits filed in regard to this revision are as follows: E

(a) Applicant's affidavit in support affirmed and attested on 4 September 2018 (encl. 3);

(b) Respondent's affidavit in reply affirmed and attested on 21 September 2018 (encl. 4);

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(c) Applicant's affidavit in reply affirmed and attested on 9 October 2018 (encl. 7);

Background Facts

[3] The applicant was charged in the Sessions Court for two counts of G charges under s. 188(2)(a) Capital Markets and Services Act 2007 (Act 671) in which he had claimed trial. The charges read as follows:

For Case No. 62-575-07-2012

… That you on 13 February 2008 at Bursa Malaysia Securities Berhad (Company No: 635998-W), Bukit Kewangan, 50200 Kuala Lumpur in the H Federal Territory of Kuala Lumpur, acquired 200,000 units of shares of UEM World Berhad (Company No. 608514-U) ("the said shares") while in possession of information that was not generally available which on becoming generally available a reasonable person would expect it to have a material effect on the price or the value of the said shares, such I information being:

– The proposed Non-Renounceable Restricted Offer for Sale by UEM World Berhad of shares in its listed subsidiaries to the shareholders of UEM World Berhad;

– The proposed Dividend in Specie of Shares in UEM Land Sdn Bhd or a holding company holding 100% of UEM Land Sdn Bhd to the shareholders of UEM World Berhad;

– The proposed listing of UEM Land Sdn Bhd on the Main Board of Bursa Malaysia Securities Berhad;

– The proposed capital repayment to the shareholders of UEM World Berhad;

and you ought reasonably to have known that such information was not generally available and you have thereby committed an offence under section 188(2)(a) of Capital Markets and Services Act 2007 (Act 671) and punishable under section 188 (4) of the same act …

For Case No. 62-576-07-2012

… That you on 18 September 2008 at Bursa Malaysia Securities Berhad (Company No: 635998-W), Bukit Kewangan, 50200 Kuala Lumpur in the Federal Territory of Kuala Lumpur, acquired 100,000 units of shares of VADS Berhad (Company No. 208739-W) ("the said shares") while in possession of information that was not generally available which on becoming generally available a reasonable person would expect it to have a material effect on the price or the value of the said shares, such information being the privatization of VADS Berhad *via* a selective capital reduction and repayment exercise under section 64 of the Companies Act 1965 and you ought reasonably to have known that such information was not generally available and you have thereby committed an offence under section 188 (2)(a) of Capital Markets and Services Act 2007 (Act 671) and punishable under section 188 (4) of the same act …

[4] The respondent had filed in an application for both charges to be heard together on 29 June 2018. The applicant, who had opposed the application now filed for a notice of motion to revise the order made on 23 August 2018. Hence the instant proceeding before me.

The Applicant's Submission

[5] The applicant submitted that the SCJ should have ordered the charges against him be tried separately. The parties might call their own expert witnesses(s) to produce technical documents including "Share Price and Trading Volume Report" for UEM World Berhad and "Share Price and Trading Volume Report" for VADS Berhad. The expert witnesses would likely give evidence in respect of the shares of two different and unrelated companies and also for different transactions. On this score, if the two charges are tried together in one trial, it will lead to the introduction of evidence tending to show that the applicant is guilty of some other offence. Therefore, a separate trial is vital in order to prevent unfairness or embarrassment to the accused by inadvertently leads to confusion of issues that will subsequently prejudice the applicant and deny him of his right to a fair trial.

[6] The applicant also submitted that it is safer to have separate trials for the said two charges as they are not related to each other. It is trite law that the convenience of the prosecution is not the factor to be considered for the purpose of determining whether to order a joint trial. Further, the two charges are not related to one another, being on different dates, by two different companies and different subject matter.

[7] The applicant also submitted that a misjoinder of charges will result in an illegal trial as was established in the case of *Jayaraman & Ors v. Public Prosecutor* [1979] 1 LNS 36; [1979] 2 MLJ 88 where in this case, a misjoinder of charges will result in an illegal trial and any convictions cannot be sustained.

The Respondent's Submission

[8] The respondent submitted that there is only one accused in this case which is the applicant. Both charges came from the same kind of offence which is under s. 188(2)(a) of Capital Markets and Services Act 2007 (Act 671) and punishable under s. 188(4) of the same Act. Both offences are said to be committed within the period of 12 months, the first one was on 13 February 2008 and the other was on 18 September 2008. Thus the applicant's grounds to object this application for joint trial is not applicable and unfounded because the grounds submitted by the applicant are only applicable if the application was made under ss. 165 and 166 of the Criminal Procedure Code.

[9] The respondent relied on s. 164 of the CPC to have the two charges against the applicant to be tried together in one trial. The respondent submitted that they have fulfilled the elements set out under s. 164 of the CPC and even the said section did not prevent a joint trial if the offences were done to different victims.

[10] As for the applicant's contention that the joint trial will result in confusion of issues, the applicant did not state specifically on how the said confusion will subsequently prejudice the applicant and thereby had denied of his right to a fair trial. The respondent submitted that it is normal for a trial to have more than one issues that need to be determined by the court and should not be an excuse to say that it will cause confusion that will prejudice the applicant.

[11] As to the misjoinder of charges, the respondent submitted that it will not result to an illegal trial because what the SCJ did was only to decide for the matter to be heard together, not by joining the charges into one charge. The SCJ still have to come out with the findings for both charges even if it were heard together. Furthermore, by hearing the charges together, it will save a lot of time and cost for all the parties involved.

Analysis And Findings

[12] The hearing of this application was held on 15 January 2019 where both parties submit their case and it was later fixed for decision. On 31 January 2019, I disallowed the application and the order by the SCJ dated 23 August 2018 is affirmed. I then directed that the two charges be heard together, and highlighted my principal reasons for the same. *Via* notice of appeal dated 31 January 2019, the applicant had appealed against my entire decision given on 31 January 2019. My full grounds of judgment is as discussed below.

[13] The main issue for me to consider in determining this revision is that whether there is any miscarriage of justice that occurred as a result of the SCJ allowing the respondent's application for the criminal charges No. 62-575-07-2012 and No. 62-576-07-2012 to be heard together.

[14] The grounds for this application for revision (encl. 1) are:

(a) Both charges are not related to each other;

(b) The dates of the alleged offences are different;

(c) If the cases are heard together, will cause confusion of issues;

(d) The internal information of both cases are also different.

[15] Section 163 of the CPC provides that for every distinct offence of which any person is accused, there shall be a separate charge, and every such charge shall be tried separately, except in the case mentioned in ss. 164, 165, 166 and 170. Having read of ss. 163 and 164 of the CPC, whilst there should be a separate trial for every distinct offence with which a person is charged, it is not a must. The court is given a discretion whether to allow a joint trial of more than one offence if the conditions mentioned in the aforementioned sections are met.

Section 164 reads:

> (1) When a person is accused of more offences than one of the same kind committed within the space of twelve months from the first to the last of such offences, whether in respect of the same person or not, he may be charged with and tried at one trial for any number of them not exceeding three.
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> (2) Offences are of the same kind when they are punishable with the same amount of punishment under the same section of the Penal Code, or of any other law for the time being in force:
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> Provided that, for the purpose of this section, an offence punishable under section 379, 380, 382, 392, 393, 394, 395, 396 or 397 of the Penal Code shall be deemed to be an offence of the same kind as an offence punishable under any other of the said sections, and that an offence

A punishable under any section of the Penal Code or of any other law for the time being in force shall be deemed to be an offence of the same kind as an attempt to commit such an offence, when such an attempt is an offence.

[16] What is a "distinct offence"? Guidance can be found in the decision B of Chua J in *Peter Tham Wing Fai v. PP* [1988] 1 LNS 35; [1988] 2 MLJ 424 where His Lordship ruled that two offences would be distinct if they are not in any way inter-related. The question that arises for consideration is whether the two charges are not related to each other and if they were tried together it would lead to confusion of issues in that it would prejudice the applicant C and deny him of his right to a fair trial.

[17] In determining whether the two charges constitute the same transaction, I will examine the circumstances surrounding the charges. In this case, there would be no confusion of issues since the offences are not distinct. The two offences were of the same kind in respect of acquisition of shares D and were committed by the same accused within seven months apart which is not more than 12 months. Further, the two offences are punishable with the same amount of punishment under the same section of the same Act. In addition, the parties are well prepared for trial because during the case management, they will submit the agreed issues to be tried together with the E list of witnesses and bundle documents including any relevant technical documents to be produced by the expert witnesses. By introduction of those documents including the agreed facts, it will not, in my opinion, lead to confusion of issues that would prejudice the applicant and deny him of his right of fair trial.

F **[18]** On the facts, I would agree with the respondent that the two charges faced by the applicant are so connected with one another as to constitute the same transaction which would justify a joint trial. The case of *Jayaraman (supra)* and a recent judgment by YA Mohd Nazlan in the case of *AFM Shafiqul Hafiz v. PP* (WA-44-99-06-2018) are distinguished in that both cases G dealt with the joinder of trial of more than one accused whereas in this present case it is only the accused himself. In those circumstances, s. 164 of the CPC would be applicable.

[19] It is plain that the power to order separate or joint trial is a power exercisable by the court. The granting or refusing of the application for H separate trial is a matter of discretion of the trial judge, and where such discretion had been judicially exercised by the SCJ, the court will not interfere unless it appears that miscarriage of justice has resulted either from the granting or the refusal of the application. The issues of prejudice or miscarriage of justice do not arise this circumstance. Since the two charges can be tried in a single trial, neither unfairness nor embarrassment would be I

an issue. (See *Rex v. Sakandar Khan* [1939] 1 LNS 99; [1939] MLJ 123, *Mohamed Ramly Haji Rasip v. Public Prosecutor* [1940] 1 LNS 56; [1941] MLJ 31 and *Jayaraman & Ors v. Public Prosecutor* [1979] 1 LNS 36; [1979] 2 MLJ 88).

[20] I took cognisance of the decision of the Federal Court in *Herchun Singh & Ors v. PP* [1969] 1 LNS 52; [1969] 1 MLRA 382 (FC), where it states that:

> … An Appellate Court should be slow in disturbing such finding of fact arrived at by the Judge, who had the advantage of seeing and hearing the witness, unless there are substantial and compelling reasons for disagreeing with the finding …

[21] Also, as was decided in *PP v. Hamzah Yunus* [2017] 1 LNS 1185, where Ahmadi Hj Asnawi JCA has once again reiterated the same concrete principle, as follows:

> … We were with the learned trial judge. These were findings of fact and/or inferences made by the trial judge who had the audio and visual advantage of observing and assessing the witnesses testifying before him, something which we did not possess. Such findings of fact by the trial judge is therefore entitled to great respect and great weight should be attached thereto unless of course the decision of the fact finder is plainly wrong. On the evidence, we were fully satisfied that the learned trial judge had not erred and his findings were fully supported by the evidence heaped against the respondent. In our view, it leaves no leeway for appellate interference in all the circumstances of this case …

[22] For the reasons discussed above, I find that there was no real substance in this application to merit my interference. The SCJ has judiciously exercised his discretion and had taken the relevant factors into consideration in allowing for the joinder of trial. Accordingly, encl. 1 is disallowed and the order by the SCJ is affirmed.